INDEX

Subject Index

	Page
Statement as to jurisdiction	1
Nature of case and statutory provisions settling jurisdiction	1
State statute the validity of which is involved	3
Dates of judgments and appeals	4
Manner in which federal question was raised	5
The federal questions involved are substantial	12
Appendix "A"—Opinion of the Supreme Court of California	13

Table of Cases Cited

Central Greyhound Line v. *Mealey*, 334 U. S. 653, 92 L. ed. 1633	12
Charleston Federal Savings & Loan Association v. *Alderson*, 374 U. S. 182, 89 L. ed. 857	12

Statutes Cited

Bank and Corporation Franchise Tax Act of California, Section 10	2
Constitution of the United States, 14th Amendment	3
United States Code, Title 28, Section 1257(2)	12

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 152

EL DORADO OIL WORKS, A CORPORATION,
Appellant,

VS.

CHARLES J. McCOLGAN, AS FRANCHISE TAX COMMISSIONER OF THE STATE OF CALIFORNIA
Appellee

APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

STATEMENT AS TO JURISDICTION

I. Nature of Case and Statutory Provisions Settling Jurisdiction

This is an appeal under Section 1257 of Title 28 of the United States Code from the final judgment of the Supreme Court of the State of California entered the 17th day of February, 1950, (Rehearing Denied March 16, 1950). The facts from which it arises may be briefly stated as follows: For the years 1934 and 1935 Appellant El Dorado Oil Works, a corporation, filed with the Franchise Tax

Commissioner of the State of California its franchise tax statements. In each of these the franchise tax was computed on the basis of the five factors provided to be used by Section 10 of the Bank and Corporation Franchise Tax Act of the State of California which then read as follows:

> "*Section 10. Computation of tax on intrastate business.* If the entire business of the bank or corporation is done within this state, the tax shall be according to or measured by its entire net income; and if the entire business of such bank or corporation is not done within this state, the tax shall be according to or measured by that portion thereof which is derived from business done within this state. The portion of net income derived from business done within this state, shall be determined by an allocation upon the basis of sales, purchases, expenses of manufacturer, pay-roll, value and situs of tangible property, or by reference to these or other factors, or by such other method of allocation as is fairly calculated to assign to the state the portion of net income reasonably attributable to the business done within this state and to avoid subjecting the taxpayer to double taxation. Income from intangible personal property which is not deductible under the provisions of subsection (h) of Section 8 hereof shall be subject to allocation.
>
> If the commissioner re-allocates net income upon his examination of any return, he shall, upon the written request of the taxpayer, disclose to him the basis upon which his re-allocation has been made. [Amendment approved June 19, 1931; Stats. 1931, p. 2226.]"

After the filing of these returns, Appellee as Franchise Tax Commissioner of the State of California re-allocated the income in question and used for his re-allocation only three of the five factors mentioned in the Statute. In other words, said Appellee used only the factors of the value of the situs of tangible property, sales and payroll and totally disregarded the factors of purchases and expense

of manufacture. By so doing Appellee omitted from his calculations the purchases made by Appellant in the Philippine Islands and sales made by Appellant outside of the State of California, with the result that Appellee's re-allocation of the income increased the tax by the amount of $3,126.58 for the year 1934 and $4,339.04 for the year 1935. On the 16th day of February, 1937, Appellant took an appeal to the Board of Equalization of the State of California, which Board sustained the re-allocation of Appellee.

On May 28, 1941, Appellant filed a complaint in the Superior Court of the State of California in and for the City and County of San Francisco for the return of its tax as previously paid on the basis of Appellee's re-allocation. On June 3, 1948, the said Superior Court rendered its judgment sustaining Appellee in his collection of the tax. Thereafter, and on or about the 2nd day of August, 1948, Appellant took an appeal from the said judgment to the Supreme Court of the State of California, which Court on the 17th day of February, 1950, issued its decision affirming said judgment. Thereafter, and within the time allowed by law Appellant petitioned for a re-hearing in said Supreme Court, which re-hearing was denied by said Court on March 16, 1950.

II. State Statute the Validity of Which Is Involved

There was thus drawn in question the validity under the Fourteenth Amendment of a certain statutory provision of the State of California. This provision was as follows:

> "*Section 10. Computation of tax on intrastate business.* If the entire business of the bank or corporation is done within this state, the tax shall be according to or measured by its entire net income; and if the

entire business of such bank or corporation is not done within this state, the tax shall be according to or measured by that portion thereof which is derived from business done within this state. The portion of net income derived from business done within this state, shall be determined by an allocation upon the basis of sales, purchases, expenses of manufacturer, pay-roll, value and situs of tangible property, or by reference to these or other factors, or by such other method of allocation as is fairly calculated to assign to the state the portion of net income reasonably attributable to the business done within this state and to avoid subjecting the taxpayer to double taxation. Income from intangible personal property which is not deductible under the provisions of subsection (h) of section 8 hereof shall be subject to allocation.

If the commissioner re-allocates net income upon his examination of any return, he shall, upon the written request of the taxpayer, disclose to him the basis upon which his re-allocation has been made. [Amendment approved June 19, 1931; Stats. 1931, p. 2226.]'' (Bank and Corporation Franchise Tax Act.)

The foregoing Section was held to permit a re-allocation of Appellant's income on a formula based upon three of the factors mentioned in the Statute, which re-allocation assigned to Appellant income earned outside of the State of California.

III. Dates of Judgments and Appeals

The final decision of the Supreme Court of the State of California upholding the judgment theretofore rendered in favor of Appellee in the Superior Court of the State of California plainly sustained the constitutionality of the above Statute under the Fourteenth Amendment of the Constitution of the United States. The judgment of the Superior Court referred to above was entered on June 3,

1948, and the decision of the Supreme Court of the State of California was rendered on February 17, 1950, with a re-hearing being denied on March 16, 1950. A petition for appeal to this Court was presented to the Honorable Phil S. Gibson, Chief Justice of the Supreme Court of the State of California, on June 2, 1950, and was by him denied on the same day.

IV. Manner in Which Federal Question Was Raised

The Federal question in this case was raised at the outset, that is in the complaint filed in the Superior Court, and urged in all of the proceedings in the State Courts. In the Trial Court and in the Supreme Court of the State of California it was urged that the interpretation of the Statute permitting a re-allocation of the income on the basis of three factors rather than the five factors named in the Statute deprived Appellant of property without due process of law and denied to Appellant the equal protection of the law guaranteed it by the Fourteenth Amendment to the Constitution of the United States.

The opinion of the Supreme Court of California appended to this statement affirmatively shows that the Federal question was presented to, considered and decided by it.

> "There now remains for consideration the constitutional challenge to defendant's reallocation of plaintiff's net income upon the claim that such procedure produced an arbitrary assessment in unreasonably assigning to California taxable values not attributable to business done within the state. As above noted, defendant's reallocation formula embraced only three of the factors mentioned in the statute—property, payroll, and sales—and omitted the other two—purchases and expenses of manufacture. Complaint is made only as to the first mentioned omission—purchases.

In this regard reference is made to the testimony of plaintiff's secretary that the "company's profits came from three primary sources: purchase of raw material, manufacturing, and sales," and that the favorable buying of copra in the Philippine Islands did 'definitely increase the profit; a decrease of cost increases profit.' Accordingly, it is argued that defendant's reallocation formula, excluding plaintiff's 'foreign purchases' as a separate factor, did not result in a proper apportionment of plaintiff's unitary business but rather denied plaintiff the benefit of a saving it effected through an income-producing activity without the state—an 'exclusion [which] worked to decrease the out-of-state profits and increase the within state profits or income for taxation purposes.' But conceding that plaintiff's 'foreign purchases' contributed to the profits of its overall business, it does not appear that defendant, though excluding such item as an independent factor in the reallocation formula, failed to take it into account in the apportionment of plaintiff's activities within and without the state. Thus, in the *payroll* factor allowance was made for compensation paid to plaintiff's employees who were engaged in purchasing activities in the Philippine Islands, and in the *property* factor the value of the foreign purchases of copra awaiting shipment or en route to plaintiff's manufacturing plant in the state was taken into account upon the estimate of plaintiff's total property holdings within and without the state, in the proportionate evaluation of plaintiff's integrated business. While it may be that such consideration was not equivalent to separate identification of the purchase item in the tax base, nevertheless it cannot be denied that the three factor reallocation formula in its application to plaintiff's business for the determination of its franchise tax represented an honest effort on the part of defendant 'to reach only the profits earned within the state' (Underwood Typewriter Co. v. Chamberlain, supra, 254 U. S. 113, 121) and reflected with reasonable fairness a proper balance of plaintiff's respective activities in their relative

contribution to plaintiff's total income (Matson Nav. Co. v. State Bd. of Equalization, supra 3 Cal. 2d 1, 8).

No method of allocation can precisely determine the exact amount of income attributable either to any given geographic area or to any given part of a series of business transactions culminating in the realization of a profit, and 'any effort' in that regard 'must be more or less arbitrary and fictitious' (Gorham Mfg. Co. v. Travis, 274 U. S. 975, 978) as a matter of practical tax administration. In short, as was recently said by the Supreme Court of the United States in sustaining the validity of a franchise tax assessment, the 'practical impossibility of a state's achieving a perfect apportionment of expansive, complex business activities . . . [makes] 'rough approximation rather than precision' . . . sufficient' in the formula allocation of income from a unitary business. (International Harvester Co. v. Evatt, 329 U. S. 416, 422.) Within this principle, plaintiff's 'foreign purchases' received reasonable consideration in defendant's apportionment of plaintiff's net income on the three factor tax base.

Nor is there merit in plaintiff's constitutional objection to defendant's reallocation formula because of its assignment of 100 per cent of plaintiff's sales to California, contrary to plaintiff's contention that only its sales to California customers were so classifiable. It appears that plaintiff's out-of-state sales generally followed this pattern: the sales contract would be prepared by an independent broker, usually in Chicago, where 'the principal brokers trading in [cocoanut oil and meal] held their offices'; copies of the contract would be simultaneously transmitted to plaintiff and to the buyer for signature—with plaintiff as seller executing one copy first, then returning it to the broker, who thereupon 'passed [it] to the buyer for' signing, which would be 'done out of state,' and 'so signed,' the 'copy came back to [plaintiff] . . . from the buyer direct or through the broker, usually through the [latter channel]'; shipment would then be made on the buyer's request over routes mutually

agreeable, f. o. b. California; the bill of lading would be drawn to plaintiff's order, endorsed by plaintiff, and sent with a sight draft through plaintiff's bank to the correspondent bank in the city where the buyer was located; the buyer 'would pay the draft, take up the bill of lading and take delivery' of the shipment upon arrival. As above stated, plaintiff did not have any sales office outside of California and had 'no . . . employees outside of the state who made . . . sales'; and all 'proposals for sales' received from out-of-state brokers, or otherwise, were 'canvassed' and 'acted upon' at 'daily' meetings held by plaintiff's 'executive committee' in its California office. 'One of defendant's auditors testified at the trial that it had been 'the practice of the Franchise Tax Commissioner, since at least 1930 . . . , in [the] case of a corporation manufacturing goods in California which has no employees engaged in sales activities outside of California to treat the sales of that corporation as California sales regardless of whether title to the goods was transferred outside of the State of California or within the state.'

Plaintiff maintains that such sales were not properly allocable to California because consummated without the state—the contract was signed by the buyer without the state, and payment and delivery took place without the state. But disregarding the argument that 'the property in the goods' sold by plaintiff 'passed to the buyer' on delivery to the railroad carrier in California and the 'bill of lading' was in form in favor of plaintiff 'only for the purpose of securing' payment by the buyer in 'performance . . . of his obligations under the contract,' so as to make such sale one in fact consummated in California (Civ. Code, sec. 1740, subd. (2); Uniform Sales Act), it must be remembered that the tax problem here in question concerns not a sales tax upon the transaction itself but a franchise tax assessment measured by plaintiff's net income derived from business done within this state. Accordingly, the focal point for consideration is the place where the activ-

ities of the corporation occurred which resulted in the sales. This precise matter was at issue in the case of Irvine Co. v. McColgan, 26 Cal. 2d 160, where the plaintiff taxpayer, a foreign corporation authorized to do business within the state, sought an allocation of its net income for franchise tax purposes on the claim that it shipped a portion of its agricultural crop, all of which was grown in this state, 'directly to purchasers in other states upon orders obtained or sales made therein by independent produce brokers' (p. 168) —a method of marketing which in its opinion constituted the transaction of business without the state. Plaintiff in that case admittedly had no employees outside the state and the proceeds from all its sales were received here. Accordingly this court, in rejecting plaintiff's theory as to its franchise tax liability for business done within this state, continued at page 168: 'The argument that plaintiff is entitled to an allocation because the latter sales partook of the nature of transactions in interstate commerce, is successfully countered by the argument that plaintiff's entire business was done within this state since *all of its activities giving rise to income from interstate sales were carried on in California.*' (Emphasis added.) A parallel situation exists here insofar as plaintiff's out-of-state sales are concerned, with 'all of *its* activities giving rise to income' therefrom—its passing upon the sales in executive committee meeting, its signing of the contracts, its shipment of the product, and its receipt of the proceeds—'carried on in California.' In such circumstances the place where the buyer signed the contract with plaintiff or took delivery of the shipment from the carrier (International Harvester Co. v. Evatt, supra, 329 U. S. 416) or where title to the goods passed (Montag Bros. Co. v. State Revenue Com., [Ga.] 179 S.E. 563, aff. 186 S.E. 558; Trane Co. v. Wisconsin Tax Com., [Wis.] 292 N.W. 897; see Irvine Co. v. McColgan, supra, 26 Cal. 2d 160, 168) is not necessarily determinative of the sales situs for the purpose of computing the sales factor in the appli-

cation of a 'method of allocation . . . fairly calculated to assign to the State the portion of net income reasonably attributable to the business done within this State' (Sec. 10).

In assailing defendant's reallocation formula as producing a wholly disproportionate result in the measurement of its net income from business done within and without the state, plaintiff mainly relies on these two cases: People ex rel. Alpha Portland Cement Co. v. Knapp, [N. Y.] 129 N.E. 202, cert. den. 256 U. S. 702; and Hans Rees' Sons v. North Carolina, 283 U. S. 123. Both cases are readily distinguishable.

In the Portland Cement Co. case the question was whether the tax commissioner could constitutionally include within an allocation formula income received by the taxpayer—a foreign corporation—from stocks and bonds having a situs without the state and in no-wise connected with the conduct of its unitary business. It was held that he could not since such income was clearly segregable 'according to the situs of its origin' and apart from the operations of the business, so that under constitutional limitations it was subject to tax only in that state where it had its source. (Southern Pacific Co. v. McColgan, supra, 68 Cal. App. 2d 48, 57, 60.) Here, in contrast, the tax problem concerns only income derived from the conduct of a unitary business, and the necessary use of a formula arises because of the recognized 'impossibility of allocating specifically the profits earned by the processes conducted within [the state's] borders.' (Underwood Typewriter Co. v. Chamberlain, supra, 254 U. S. 113, 121.)

In the Hans Rees' case the formula method of allocating income earned by a unitary business was recognized as generally sound in application, but in that particular instance the formula employed, consisting of the single factor of property, failed to give proper weight to the extensive activities of the company without the state so that the result reached was unreasonable. There, by use of the formula, approximately 80

per cent of the entire income of the company, a foreign corporation, was allocated to the taxing state—'a percentage of income out of all appropriate proportion to the business transacted by the [company] in that state' (page 135) in view of the company's evidence tending to show that for the years in question its average income having a source in its operations within the state was but 17 per cent, and in no event exceeded 21.7 per cent of its total business. Plaintiff here has made no such demonstration as to the unfairness of the result reached in the application of defendant's reallocation formula to its unitary business. (See International Harvester Co. v. Evatt, supra, 329 U. S. 416, 423.)

The 'statute on its face carries [the] presumption of constitutionality which attaches to all legislative acts' (Maxwell v. Kent-Coffey Mfg. Co., [N. Car.] 168 S.E. 397, 402) and 'to rebut the presumption that the formula produced a fair result, 'the burden is on the taxpayer to make oppression manifest by clear, cogent evidence' (*Norfolk & Western Ry. Co. v. North Carolina* (1936), 297 U. S. 682, 688 [56 S. Ct. 625, 80 L. Ed. 977].) . . . that more taxes have been exacted than in equity and good conscience should have been paid.' (Pacific Fruit Express Co. v. McColgan, supra, 67 Cal. App. 2d 93, 96.) As the record has been here analyzed in the light of plaintiff's contentions, defendant's reallocation formula based on the three factor tax base—property, payroll, and sales—appears in its application to plaintiff's business, to have been an honest effort to apportion to California that part of plaintiff's net income fairly attributable to business done within this state, and to have given appropriate consideration to the various elements entering into the overall enterprise so as to be free from constitutional objection on the ground that it operated to tax extraterritorial values in violation of the due process and equal protection of the law clauses of the Fourteenth Amendment. It therefore follows that defendant's additional franchise tax assessments against

plaintiff for the two years in question must be sustained. (Underwood Typewriter Co. v. Chamberlain, supra, 254 U. S. 113; Bass, Ratcliff & Gretton, Ltd. v. State Tax Com., 266 U. S. 271.)

The judgment is affirmed."

(From Opinion of California Supreme Court—See Appendix A)

V. The Federal Questions Involved Are Substantial

The ultimate Federal question presented to the Supreme Court of the State of California was the validity under the Fourteenth Amendment of an interpretation of a certain statute which would permit a franchise tax to be assessed upon income earned by reason of activities outside of the State of California. The question presented by this appeal is whether under applicable decisions of this Court this ultimate constitutional question may be decided as it was by the Supreme Court of the State of California, that is, whether the interpretation given to the statute is constitutional under the Fourteenth Amendment. The Appellant in this case is seeking the return of $7,465.62 in taxes illegally collected.

(*Charleston Federal Savings & Loan Association et al.* vs. *George P. Alderson,* 374 U. S. 182, 89 L. Ed. 857; *Central Greyhound Line* vs. *Mealey,* 334 U. S. 653, 92 L. Ed. 1633).

VI. It is therefore respectfully submitted that this Court has jurisdiction over this appeal under Section 1257(2) of Title 28 of the United States Code as amended.

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APPENDIX "A"

S. F. No. 17862

EL DORADO OIL WORKS, a Corporation, *Plaintiff and Appellant,*

vs.

CHARLES J. McCOLGAN, as Franchise Tax Commissioner of the State of California, *Defendant and Respondent*

Filed Feb. 17, 1950. William I. Sullivan, Clerk, By ——, Deputy

Plaintiff brought this action to recover the amounts assessed against it as additional franchise taxes by defendant, under authority of the Bank and Corporation Franchise Tax Act (Stats. 1929, p. 19, as amended; Deering's Gen. Laws, 1931, Act 8488, p. 4763; 1933 Supp., p. 2329; 1935 Supp., p. 1929), for the taxable years 1935 and 1936, which taxes were based respectively upon income for the years 1934 and 1935, and were paid under protest. The trial court found in defendant's favor, and from the judgment accordingly entered, plaintiff appeals.

The sole point in controversy is the propriety of the reallocation formula used by defendant in computing plaintiff's franchise taxes for the two years involved. An examination of the record in the light of applicable legal principles compels the conclusion that the method of apportionment applied by defendant in determining the net income earned by plaintiff's unitary business for purposes of the state franchise tax may not be successfully challenged, and accordingly the judgment must be affirmed.

During the years 1934 and 1935 plaintiff, a California corporation, was principally engaged in the processing and sale of cocoanut oil and meal. Its manufacturing plant and all related facilities were located in this state. It purchased the bulk of its raw material, copra, in the Philippine Islands, where it maintained offices for that purpose. In the first four months of 1934, a portion of its required

copra supply was obtained in the Dutch East Indies through a buying agency in which plaintiff owned a 40 per cent interest, but such purchasing practice was discontinued in May of that year. The Dutch East Indies agency operated independently in making purchases on behalf of plaintiff as one of its stockholders, and plaintiff never had any of its own employees performing services outside of this state in connection therewith. Plaintiff's products were sold to purchasers throughout the United States, with the shipping terms "f.o.b. cars at [its] plant in California." It maintained no sales office or salesmen in any state other than California. Sales to customers out of the state were negotiated in the main through independent brokers—not employees of plaintiff—although occasionally such customers contacted plaintiff's local sales office directly by telephone or telegraph. Plaintiff's executive committee meeting in its local office passed upon all proposals relating to sales transactions. Plaintiff's only employees located out of the state were those engaged in its purchasing activities in the Philippine Islands. At the same time plaintiff also had certain employees within the state who performed limited buying services for it.

Plaintiff made and filed its tax returns for the two years mentioned and paid the taxes so reported, using as the basis for the returns, in computing the percentage of business done in California, the average which these five factors within the state—property, payroll, sales, purchases, and manufacturing costs—bore to the total of such factors within and without the state. On this basis plaintiff allocated to California for the respective two income years, 1934 and 1935, 63.6282 per cent and 59.0915 per cent of its total net income.

Defendant Tax Commissioner rejected the schedules and returns so filed by plaintiff and made a reallocation on the basis of a formula consisting only of these three factors—property, payroll, and sales. In making such reapportionment, defendant accepted plaintiff's figures for two factors, property and payroll, but assigned 100 per cent of plaintiff's gross sales to business done within the state in lieu of the apportionment figures of 38.5029 per cent and 22.2821

per cent of total sales submitted by plaintiff for the respective income years, 1934 and 1935, upon the basis that sales to customers out of the state were not allocable to California. Under such reallocation, plaintiff's net income from business done within the state was fixed at 89.8786 per cent for the income year 1934 and at 82.18 per cent for the income year 1935, and additional tax assessments were accordingly made by defendant. After taking an appeal to the State Board of Equalization, which sustained defendant in his reallocation formula, plaintiff paid under protest the additional assessments with interest and then brought this action to recover such amounts.

As above indicated, the protested taxes were levied under authority of the Bank and Corporation Franchise Tax Act (Stats. 1929, p. 19, as amended; Deering's Gen. Laws, Act 8488), hereinafter referred to as the act. Section 4 provided that a corporation doing business within the limits of the state, and not expressly exempted from taxation, shall annually pay, for the privilege of exercising its corporate franchise in the state, a tax measured by 4 per cent of its net income earned during the preceding fiscal or calendar year, the minimum tax being $25. As in effect during the period here involved, section 10 provided that if the entire business of the corporation is not done within the state, the "tax shall be according to or measured by that portion thereof which is derived from business done within this State . . . determined by an allocation upon the basis of sales, purchases, expenses of manufacturer, pay roll, value and situs of tangible property, or by reference to these or other factors, or by such other method of allocation as is fairly calculated to assign to the State the portion of net income reasonably attributable to the business done within this State and to avoid subjecting the taxpayer to double taxation."

Plaintiff concedes that income from business done within the state may properly include income from interstate and foreign commerce to the extent that such is done within the state, as well as income from purely intrastate business (Matson Nav. Co. v. State Bd. of Equalization, 3 Cal. 2d 1, aff. 297 U. S. 441; United States Glue Co. v. Oak

Creek, 247 U. S. 321; Underwood Typewriter Co. v. Chamberlain, 254 U. S. 113; Southern Pacific Co. v. McColgan, 68 Cal. App. 2d 48, 61), and that during the period here involved it was engaged in a unitary business within and without the state so as to be subject to an allocation method of taxation in the assessment of the franchise tax (Butler Brothers v. McColgan, 17 Cal. 2d 664, aff. 315 U. S. 501). The only question is whether defendant may be sustained in his reallocation of plaintiff's net income for franchise tax purposes.

As the disputed issue is so narrowed, plaintiff and amicus curiae argue that the legislature designated in the terms of the act *five* factors for use in the allocation formula as a standard yardstick for determining that portion of a unitary business taxable within the state; that the statutory authority to use an alternative formula contemplates only a situation where the five factor formula would not truly reflect the income-producing elements of the unitary business, and to that limited extent the Franchise Tax Commissioner may exercise his discretion in the choice of a formula; and that since the five designated factors were all applicable to plaintiff's business, it was improper to substitute another formula for the computation of its franchise tax—and in particular, excluding as a separate factor plaintiff's purchase transactions in the consideration of its business activities, an omission which allegedly threw the entire reallocation formula off balance in reflecting plaintiff's overall business operations. Plaintiff also objects to defendant's "arbitrary" assignment of 100 per cent of its gross sales to within-the-state business, claiming that such treatment did not take into account its undisputed method of transacting sales without the state. Accordingly, plaintiff and amicus curiae contend that defendant's reallocation formula, in its application to plaintiff's unitary business, attributed to California a percentage of income out of proportion to the business done within the state and so violated the due process and equal protection of the law clauses of the Fourteenth Amendment of the federal Constitution.

On the other hand, defendant urges that the three factor formula be adopted in reallocating plaintiff's net income earned in its unitary business is recognized as a reasonable method of apportionment (Butler Brothers v. McColgan, supra, 17 Cal. 2d 664, 677, aff. 315 U. S. 501, 509; Edison California Stores, Inc. v. McColgan, 30 Cal. 2d 472, 479) and is most frequently used throughout the states in working out allocation problems (Silverstein, Problems of Apportionment in Taxation of Multistate Business, 4 Tax Law Review [1949], 207, 258; Altman and Keesling, Allocation of Income in State Taxation [1946], pp. 37, 107-108); that the act authorizes the exercise of discretion in the adoption of an allocation formula deemed appropriate to the tax problem at hand in determining the income derived from business done within the state; and that his reallocation formula based upon *three* rather than five factors, omitting as an independent item plaintiff's purchase transactions and re-assigning the sales' values attributable to California activities, fairly apportioned plaintiff's income within and without the state and so is free from constitutional objection. We have concluded that the trial court properly found in accordance with defendant's views, consistent with his statutory power and the reasonableness of his procedure.

The fact that defendant's reallocation formula was based on only three of the five factors specified in section 10 of the act did not constitute a violation thereof, for under its express provisions the "commissioner is authorized to determine the net income derived from business done within this state by an allocation upon those specified factors, 'or by reference to these or other factors, or by such other method of allocation as is fairly calculated to assign to the State the portion of net income reasonably attributable to the business done within this State . . .'" (Pacific Fruit Express Co. v. McColgan, 67 Cal. App. 2d 93, 104-105.) While in the cited case the particular nature of the taxpayer's unitary business required special treatment and a three factor formula consisting of property, payroll, and mileage (the latter item in lieu of sales) was deemed applicable, the wording of the section does not

indicate that the commissioner's power to adopt a formula is restricted to such limited factual situation, in which the general formula mentioned in the section would be inappropriate as a tax base in the measure of the taxpayer's business activities. On the contrary, the broad language of the section indicates that the factors therein designated are suggestive, but not mandatory or exclusive, and that the commissioner is empowered in his discretion to choose such tax base for his formula allocation as will carry out the act's purpose to achieve a proper apportionment of business done within and without the state, and at the same time avoid double taxation.

Nor does the legislature's grant of such authority to the commissioner consistent with the flexible administration of the act constitute an unlawful delegation of power and render the act unconstitutional in that respect. So pertinent is the precise wording of the governing constitutional provision pursuant to which the act was adopted in 1929 (Art. XIII, sec. 16, subd. (5)), stating that "the legislature shall *define* 'corporations' . . . shall *define* 'net income' [but] *shall provide for the allocation of income* . . ." (Emphasis added.) Had it been the intent that the legislature should make the specific allocation, it would seem that the constitutional provision would have read "shall allocate" rather than "shall provide for the allocation of" income. Accordingly, in delegating to the commissioner the power of determining the formula to be used in apportioning the net income earned from business done within and without the state, the legislature has "provided for" the allocation of income within the meaning of the constitutional provision. (Pacific Fruit Express Co. v. McColgan, supra, 67 Cal. App. 2d 93, 101-102.) Moreover, it has been held under similar provisions of the Constitution (Art. XIII, sec. 14, subd. (d), authorizing the imposition of the bank corporation franchise tax) that the legislature need not prescribe the exact method by which the tax is to be fixed, but "may delegate to its taxing officers the power to adopt a suitable method." (Utah Construction Co. v. Richardson, 187 Cal. 649, 652.) The essential requirement is the legislature's specification of a standard—"an

intelligible principle to which the person or body authorized to [administer the act] is directed to conform" (Hampton & Co. v. United States, 276 U. S. 394, 409)—but it may leave to the administrative agency the precise determination necessary to bring the standard into operation. Section 10 complies with this principle in "calling for a method of allocation which is 'fairly calculated' to assign to California that portion of the net income 'reasonably attributable' to the business done there." (Butler Brothers v. McColgan, supra, 315 U. S. 501, 506.)

The three factor formula of property, payroll, and sales here applied by defendant in the apportionment of plaintiff's unitary business within and without the state has been recognized as sufficiently diversified to "reflect 'the relative contribution of [out-of-state] activities . . . to the production of the total unitary income,' so as to allocate to California its just proportion of the profits earned . . . from [a] unitary business" (Butler Brothers v. McColgan, supra, 315 U. S. 501, 509), and its "fairness" has been declared "settled" (Edison California Stores, Inc. v. McColgan, supra, 30 Cal. 2d 472, 479), consistent with practical administrative difficulties that necessarily arise in fixing upon a workable formula for general application (cf. Butler Brothers v. McColgan, supra, 17 Cal. 2d 664, 677). Although the principal issue in these cited cases was whether the taxpayer's business activities within and without the state were such as to render the formula allocation rather than a separate accounting method appropriate for the admeasurement of the franchise tax, nevertheless in resolving such controversial point the fairness and reasonableness of the specific three factor formula here in question was a necessary consideration in sustaining the propriety of the commissioner's tax assessment upon the apportioned tax base. (Gwinn v. Hamilton, 75 Cal. 265, 266; Cameron v. United States, 250 Fed. 943, 947.)

Plaintiff argues the import of an official order addressed to it from defendant's office in 1933, directing it to use the five factor formula in the allocation of its income for franchise tax purposes, but such directive would not estop defendant from adopting another formula for the measure-

ment of the tax in conformity with the standard established by the statute. (Cal. Emp. Com. v. Black-Foxe Inst., 43 Cal. App. 2d (Supp.) 868, 876). One of defendant's auditors testified at the trial that in the years following 1933 it was the "Commissioner's practice to use the three factor formula generally," and in line therewith the record shows that for the taxable year immediately preceding the years here involved, that is 1934, plaintiff was advised by defendant that its allocation would be made on the three factor tax base. Such long continued practice in the handling of thousands of allocation problems since the cited year 1933 was presumably within the knowledge of the legislature and yet it made no modification in section 10 of the act which would require a different construction as to defendant's authority thereunder (Stats. 1935, p. 965; Stats. 1939, p. 2944)—a strong factor indicating that the administrative practice was consistent with the legislature's intent relative to the commissioner's power in carrying out the allocation principle of the section. (Coca-Cola Co. v. State Bd. of Equalization, 25 Cal. 2d 918, 922, and cases cited; People v. Universal Film Exchange, 34 A. C. —, —; see, also, White v. Winchester Country Club, 315 U. S. 32, 41). As section 10 is so construed, it necessarily must be concluded that defendant's application of the three factor formula as a preferred general practice is not open to objection as an unauthorized exercise of power so long as it produces the desired proportionate result directed by the statute and at the same time avoids subjecting the tax-payer to double taxation. To this latter point it need only be said here that it is undisputed that plaintiff, on the basis of its business activities during the years involved in this case, "paid [no] taxes in any state other than California." (Cf. Southern Pacific Co. v. McColgan, supra, 68 Cal. App. 2d 48, 52-53.)

There now remains for consideration the constitutional challenge to defendant's reallocation of plaintiff's net income upon the claim that such procedure produced an arbitrary assessment in unreasonably assigning to California taxable values not attributable to business done within the state. As above noted, defendant's reallocation formula embraced only three of the factors mentioned in the statute

—property, payroll, and sales—and omitted the other two—purchases and expenses of manufacture. Complaint is made only as to the first mentioned omission—purchases. In this regard reference is made to the testimony of plaintiff's secretary that the "company's profits came from three primary sources: purchase of raw material, manufacturing, and sales," and that the favorable buying of copra in the Philippine Islands did "definitely increase the profit; a decrease of cost increases profit." Accordingly, it is argued that defendant's reallocation formula, excluding plaintiff's "foreign purchases" as a separate factor, did not result in a proper apportionment of plaintiff's unitary business but rather denied plaintiff the benefit of a saving it effected through an income-producing activity without the state—an "exclusion [which] worked to decrease the out-of-state profits and increase the within state profits or income for taxation purposes." But conceding that plaintiff's "foreign purchases" contributed to the profits of its overall business, it does not appear that defendant, though excluding such item as an independent factor in the reallocation formula, failed to take it into account in the apportionment of plaintiff's activities within and without the state. Thus, in the *payroll* factor allowance was made for compensation paid to plaintiff's employees who were engaged in purchasing activities in the Philippine Islands, and in the *property* factor the value of the foreign purchases of copra awaiting shipment or en route to plaintiff's manufacturing plant in the state was taken into account upon the estimate of plaintiff's total property holdings within and without the state, in the proportionate evaluation of plaintiff's integrated business. While it may be that such consideration was not equivalent to separate identification of the purchase item in the tax base, nevertheless it cannot be denied that the three factor reallocation formula in its application to plaintiff's business for the determination of its franchise tax represented an honest effort on the part of defendant "to reach only the profits earned within the state" (Underwood Typewriter Co. v. Chamberlain, supra, 254 U. S. 113, 121) and reflected with reasonable fairness a proper balance of plaintiff's respective activities in their relative contribution

to plaintiff's total income (Matson Nav. Co. v. State Bd. of Equalization, supra, 3 Cal. 2d 1, 8).

No method of allocation can precisely determine the exact amount of income attributable either to any given geographic area or to any given part of a series of business transactions culminating in the realization of a profit, and "any effort" in that regard "must be more or less arbitrary and fictitious" (Gorham Mfg. Co. v. Travis, 274 U. S. 975, 978) as a matter of practical tax administration. In short, as was recently said by the Supreme Court of the United States in sustaining the validity of a franchise tax assessment, the "practical impossibility of a state's achieving a perfect apportionment of expansive, complex business activities . . . [makes] 'rough approximation rather than precision' . . . sufficient" in the formula allocation of income from a unitary business. (International Harvester Co. v. Evatt, 329 U. S. 416, 422.) Within this principle, plaintiff's "foreign purchases" received reasonable consideration in defendant's apportionment of plaintiff's net income on the three factor tax base.

Nor is there merit in plaintiff's constitutional objection to defendant's reallocation formula because of its assignment of 100 per cent of plaintiff's sales to California, contrary to plaintiff's contention that only its sales to California customers were so classifiable. It appears that plaintiff's out-of-state sales generally followed this pattern: the sales contract would be prepared by an independent broker, usually in Chicago, where "the principal brokers trading in [cocoanut oil and meal] held their offices"; copies of the contract would be simultaneously transmitted to plaintiff and to the buyer for signature—with plaintiff as seller executing one copy first, then returning it to the broker, who thereupon "passed [it] to the buyer for" signing, which would be "done out of state," and "so signed," the "copy came back to [plaintiff] . . . from the buyer direct or through the broker, usually through the [latter channel]"; shipment would then be made on the buyer's request over routes mutually agreeable, f. o. b. California; the bill of lading would be drawn to plaintiff's order, endorsed by plaintiff, and sent with a sight draft through

plaintiff's bank to the correspondent bank in the city where the buyer was located; the buyer "would pay the draft, take up the bill of lading and take delivery" of the shipment upon arrival. As above stated, plaintiff did not have any sales office outside of California and had "no . . . employees outside of the state who made . . . sales"; and all "proposals for sales" received from out-of-state brokers, or otherwise, were "canvassed" and "acted upon" at "daily" meetings held by plaintiff's "executive committee" in its California office. "One of defendant's auditors testified at the trial that it had been "the practice of the Franchise Tax Commissioner, since at least 1930 . . ., in [the] case of a corporation manufacturing goods in California which has no employees engaged in sales activities outside of California to treat the sales of that corporation as California sales regardless of whether title to the goods was transferred outside of the state of California or within the state."

Plaintiff maintains that such sales were not properly allocable to California because consummated without the state—the contract was signed by the buyer without the state, and payment and delivery took place without the state. But disregarding the argument that "the property in the goods" sold by plaintiff "passed to the buyer" on delivery to the railroad carrier in California and the "bill of lading" was in form in favor of plaintiff "only for the purpose of securing" payment by the buyer in "performance . . . of his obligations under the contract," so as to make such sale one in fact consummated in California (Civ. Code, sec. 1740, subd. (2); Uniform Sales Act), it must be remembered that the tax problem here in question concerns not a sales tax upon the transaction itself but a franchise tax assessment measured by plaintiff's net income derived from business done within this state. Accordingly, the focal point for consideration is the place where the activities of the corporation occurred which resulted in the sales. This precise matter was at issue in the case of Irvine Co. v. McColgan, 26 Cal. 2d 160, where the plaintiff taxpayer, a foreign corporation authorized to do business within the state, sought an allocation of its net income for franchise tax purposes on the claim

that it shipped a portion of its agricultural crop all of which was grown in this state, "directly to purchasers in other states upon orders obtained or sales made therein by independent produce brokers" (p. 168)—a method of marketing which in its opinion constituted the transaction of business without the state. Plaintiff in that case admittedly had no employees outside the state and the proceeds from all its sales were received here. Accordingly this court, in rejecting plaintiff's theory as to its franchise tax liability for business done within this state, continued at page 168: "The argument that plaintiff is entitled to an allocation because the latter sales partook of the nature of transactions in interstate commerce, is successfully countered by the argument that plaintiff's entire business was done within this state since *all of its activities giving rise to income from interstate sales were carried on in California.*" (Emphasis added.) A parallel situation exists here insofar as plaintiff's out-of-state sales are concerned, with "all of *its* activities giving rise to income" therefrom —its passing upon the sales in executive committee meeting, its signing of the contracts, its shipment of the product, and its receipt of the proceeds—"carried on in California." In such circumstances the place where the buyer signed the contract with plaintiff or took delivery of the shipment from the carrier (International Harvester Co. v. Evatt, supra, 329 U. S. 416) or where title to the goods passed (Montag Bros. Co. v. State Revenue Com., [Ga.] 179 S. E. 563, aff. 186 S. E. 558; Trane Co. v. Wisconsin Tax Com., [Wis.] 292 N. W. 897; see Irvine Co. v. McColgan, supra, 26 Cal. 2d 160, 168) is not necessarily determinative of the sales situs for the purpose of computing the sales factor in the application of a "method of allocation . . . fairly calculated to assign to the State the portion of net income reasonably attributable to the business done within this State" (Sec. 10).

In assailing defendant's reallocation formula as producing a wholly disproportionate result in the measurement of its net income from business done within and without the state, plaintiff mainly relies on these two cases: People ex rel. Alpha Portland Cement Co. v. Knapp, [N. Y.] 129 N. E. 202, cert. den. 256 U. S. 702; and Hans Rees' Sons v.

North Carolina, 283 U. S. 123. Both cases are readily distinguishable.

In the Portland Cement Co. case the question was whether the tax commissioner could constitutionally include within an allocation formula income received by the taxpayer—a foreign corporation—from stocks and bonds having a situs without the state and in nowise connected with the conduct of its unitary business. It was held that he could not since such income was clearly segregable "according to the situs of its origin" and apart from the operations of the business, so that under constitutional limitations it was subject to tax only in that state where it had its source. (Southern Pacific Co. v. McColgan, supra, 68 Cal. App. 2d 48, 57, 60.) Here, in contrast, the tax problem concerns only income derived from the conduct of a unitary business, and the necessary use of a formula arises because of the recognized "impossibility of allocating specifically the profits earned by the processes conducted within [the state's] borders." (Underwood Typewriter Co. v. Chamberlain, supra, 254 U. S. 113, 121.)

In the Hans Rees' case the formula method of allocating income earned by a unitary business was recognized as generally sound in application, but in that particular instance the formula employed, consisting of the single factor of property failed to give proper weight to the extensive activities of the company without the state so that the result reached was unreasonable. There, by use of the formula, approximately 80 per cent of the entire income of the company, a foreign corporation, was allocated to the taxing state—"a percentage of income out of all appropriate proportion to the business transacted by the [company] in that state" (page 135) in view of the company's evidence tending to show that for the years in question its average income having a source in its operations within the state was but 17 per cent, and in no event exceeded 21.7 per cent of its total business. Plaintiff here has made no such demonstration as to the unfairness of the result reached in the application of defendant's reallocation formula to its unitary business. (See International Harvester Co. v. Evatt, supra, 329 U. S. 416, 423.)

The "statute on its face carries [the] presumption of

constitutionality which attaches to all legislative acts" (Maxwell v. Kent-Coffey Mfg. Co., [N. Car.] 168 S. E. 397, 402) and "to rebut the presumption that the formula produced a fair result, 'the burden is on the taxpayer to make oppression manifest by clear, cogent evidence' (*Norfolk & Western Ry. Co.* v. *North Carolina* (1936), 297 U. S. 682, 688 [56 S. Ct. 625, 80 L. Ed. 977].) . . . that more taxes have been exacted than in equity and good conscience should have been paid." (Pacific Fruit Express Co. v. McColgan, supra, 67 Cal. App. 2d 93, 96.) As the record has been here analyzed in the light of plaintiff's contentions, defendant's reallocation formula based on the three factor tax base—property, payroll, and sales—appears in its application to plaintiff's business, to have been an honest effort to apportion to California that part of plaintiff's net income fairly attributable to business done within this state, and to have given appropriate consideration to the various elements entering into the overall enterprise so as to be free from constitutional objection on the ground that it operated to tax extraterritorial values in violation of the due process and equal protection of the law clauses of the Fourteenth Amendment. It therefore follows that defendant's additional franchise tax assessments against plaintiff for the two years in question must be sustained. (Underwood Typewriter Co. v. Chamberlain, supra, 254 U. S. 113; Bass, Ratcliff & Gretton, Ltd. v. State Tax Com., 266 U. S. 271.)

The judgment is affirmed.

SPENCE, *J.*

We Concur:

GIBSON, *C. J.*;
SHENK, *J.*;
EDMONDS, *J.*;
CARTER, *J.*;
TRAYNOR, *J.*

I Concur in the Judgment:
SCHAUER, *J.*

FILED
JUN 26 1950
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 152

EL DORADO OIL WORKS, A CORPORATION,
Appellant,

vs.

CHARLES J. McCOLGAN, AS FRANCHISE TAX COMMISSIONER OF THE STATE OF CALIFORNIA,
Appellee

APPEAL FROM THE SUPREME COURT OF CALIFORNIA

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

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INDEX

Subject Index

	Page
Statement opposing jurisdiction and motion to dismiss or affirm	1

Table of Cases Cited

American Mfg. Co. v. *St. Louis*, 250 U. S. 459	5
Butler Bros. v. *McColgan*, 315 U. S. 501, 17 Cal. (2d) 664, 315 U. S. 501	2, 3, 4
Capitol Greyhound Lines v. *Brice*, 70 S. Ct. 806	4
Cream of Wheat Co. v. *County of Grand Forks*, 253 U. S. 325	6
Illinois Cent. R. Co. v. *Minnesota*, 309 U. S. 157	4, 5
International Harvester Co. v. *Evatt*, 329 U. S. 416	5
Newark Fire Ins. Co. v. *State Board*, 307 U. S. 313	6
New York ex rel. Cohn v. *Graves*, 300 U. S. 308	5
Rock Island Refining Co. v. *Oklahoma Tax Commission*, 322 U. S. 711	5
United States Glue Co. v. *Town of Oak Creek*, 247 U. S. 321	5
Western Cartridge Co. v. *Emmerson*, 281 U. S. 511	5

Statutes Cited

California Bank and Corporation Franchise Tax Act (California Statutes 1929, p. 19, amended, Stats. 1931, p. 2226, Stats. 1935, p. 965)	2
Constitution of the United States, 14th Amendment	6

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 152

EL DORADO OIL WORKS, A CORPORATION,
Appellant,

vs.

CHARLES J. McCOLGAN, AS FRANCHISE TAX COMMISSIONER OF THE STATE OF CALIFORNIA,
Appellee

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

May it Please the Court:

Appellee in the above entitled cause moves the Court to dismiss this appeal or to affirm the judgment below for the following reason:

There is no substantial Federal question presented as a basis of jurisdiction in this Court, because the questions presented have been foreclosed by previous decisions of this Court.

Wherefore, appellee moves the Court to dismiss the appeal in this cause for want of a substantial Federal question or, in the alternative, to affirm the judgment of the Supreme Court of California from which this appeal was taken, for the reason that the questions presented are foreclosed by prior decisions of this Court.

Argument in Support of Motion, Statement of the Case, Including the Facts

This case arises under the California Bank and Corporation Franchise Tax Act (California Statutes 1929, p. 19, amended, Stats. 1931, p. 2226, Stats. 1935, p. 965.) Cf. *Butler Brothers* v. *McColgan*, 315 U. S. 501, affirming 17 Cal. (2d) 664. Sec. 4(3) of the Act provides for an annual corporate franchise tax payable by a corporation doing business within the state. The tax is measured by the corporation's net income and is at the rate of 4 per cent "upon the basis of its net income" for the preceding year. Sec. 10 prescribes the method for computing the net income which serves as the measure of the tax. The provisions of sec. 4(3) and sec. 10 are set forth in the Appendix.

The following facts appear from the findings of the trial court and have been affirmed by the Supreme Court of California. Appellant is a California corporation. During the period here involved it manufactured coconut oil from copra originating in the Philippine Islands and elsewhere in the East Indies and sold coconut oil and by-products. All of the appellant's manufacturing facilities were located in California and all of appellant's employees who were engaged in manufacturing performed services exclusively in California. All of appellant's employees who performed any services in connection with the sale of appellant's products performed those services exclusively in the State of California. With respect to the sale of appellant's products to customers located outside of the State of California, the negotiations in most instances were conducted through independent brokers who were not employees of appellant, although occasionally such customers contacted the San Francisco office of appellant directly by telephone or telegraph. All proposals relating to the sale of appellant's products were passed upon by appellant's ex-

ecutive committee in San Francisco. All of appellant's products which were sold were shipped f. o. b. cars at the appellant's plant in California. All of the activities of the appellant in connection with its sales occurred in California. The only employees of appellant who were located outside of the State of California or who performed services outside of the State of California were certain employees who performed services in the Philippine Islands in connection with the purchase of copra. Appellant also had employees in California who performed services in the State of California in connection with the purchase of copra.

During the period involved, appellant did not pay taxes in any state other than California.

The established facts we have mentioned show that appellant is a domestic corporation, that during the period involved all of its manufacturing facilities were located in the State of California and that appellant did not engage in any sales activities outside of the State of California It maintained no sales office or salesmen in any state other than California.

There is here involved a franchise tax imposed on a domestic corporation measured by net income derived from business done in California.

The income from the unitary business was apportioned by a reasonable formula. The Supreme Court of California has construed the tax statute as authorizing the formula which was used by the appellee for apportioning income, consisting of the three factors of tangible property, payroll and sales. Thus, the percentage of income apportioned to California was determined by averaging the percentages which (a) tangible property (b) payroll and (c) sales attributable to California bore to corresponding totals of such items of appellant. This is the same formula method of allocation which was upheld by this Court in *Butler*

Brothers v. *McColgan*, 315 U. S. 501 (a case in which purchasing activity constituted an important part of the unitary business). Thus the income here was apportioned on the basis of the same three-factor formula that was referred to by this Court in *Butler Brothers* v. *McColgan*, *supra*, at 509, as designed "so as to allocate to California its just proportion of the profits earned by appellant from this unitary business . . .".

The record does not support appellant's assertion that the method of apportionment used by appellee resulted in including in the measure of the tax income earned outside the State of California. The trial court found to the contrary and the Supreme Court of California sustained the trial court finding. The finding is amply supported by the record.

The allocation formula here used gave effect to appellant's out-of-state purchasing activities through the factors of payroll and property, with the result that part of appellant's income was apportioned outside the state because of and in recognition of appellant's out-of-state purchasing activities. The trial court so found and the Supreme Court of California affirmed this finding.

It is well-settled that this Court will not interfere with state efforts to effect an apportionment unless it can be shown that the state method has reached a grossly disproportionate result. *International Harvester Co.* v. *Evatt*, 329 U. S. 416, 422 423 (". . . this court has long realized the practical impossibility of a state's achieving a perfect apportionment of expansive, complex business activities such as those of appellant, and has declared that 'rough approximation rather than precision' is sufficient. *Illinois Central Ry.* v. *Minnesota*, 309 U. S. 157, 161 . . .); *Capitol Greyhound Lines v. Brice*, (May 15, 1950)——U. S. ——, 70 S. Ct. 806, 809 ("These factors, like those relevant in

considering the constitutionality of other state taxes, are so countless that we must be content with 'rough approximation rather than precision'. *International Harvester Co.* v. *Evatt*, 329 U. S. 416, 422, 423 . . ."); *Illinois Cent. R. Co. v. Minnesota*, 309 U. S. 157, 161 ("That the apportionment may not result in mathematical exactitude is certainly not a constitutional defect. Rough approximation rather than precision is, as a practical matter, the norm in any such tax system.")

As this Court recently pointed out in *Capitol Greyhound Lines* v. *Brice*, *supra*, it is neither administratively practical nor constitutionally necessary to use every conceivable factor in the apportionment formula.

In so far as the factor of sales is concerned, any question concerning the validity of attributing sales, for purposes of an allocation formula under an excise tax on the privilege of doing an intrastate business, to the state in which the goods are manufactured and in which all of the sales activities of the corporation occur, is foreclosed by the decisions of this court in *International Harvester Co.* v. *Evatt*, 329 U. S. 416, 419, 420 (". . . part of the measure of the tax is consequently an amount equal to the sales price of Ohio manufactured goods sold and delivered to customers in other states . . ."); *American Mfg. Co. v. St. Louis*, 250 U. S. 459; *Western Cartridge Co. v. Emmerson*, 281 U. S. 511; and *United States Glue Co. v. Town of Oak Creek*, 247 U. S. 321.

Thus even if appellant were a foreign corporation, its claims under the Fourteenth Amendment would have been foreclosed by prior decisions of this court. But appellant is a domestic corporation, and therefore, has even less basis for urging lack of substantive due process. *New York ex rel Cohn* v. *Graves*, 300 U. S. 308, 313; *Rock Island Refining Co.* v. *Oklahoma Tax Commission*, 322 U. S. 711 (appeal dis-

missed for lack of a substantial federal question even though domestic corporation taxed on entire net income); *Cream of Wheat Co.* v. *County of Grand Forks*, 253 U. S. 325; *Newark Fire Ins. Co.* v. *State Board*, 307 U. S. 313, 318, 324.

Conclusion

Inasmuch as appellant's contentions concerning violation of the Fourteenth Amendment of the Constitution have been foreclosed by prior decisions of this Court, we respectfully submit that this appeal should be dismissed or in the alternative that the judgment of the Supreme Court of California should be affirmed.

Dated: June 23, 1950.

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APPENDIX

California Bank and Corporation Franchise Tax Act (Stats. 1929, p. 19, amended, Stats. 1931, p. 2226, Stats. 1935, p. 965):

Section 4(3): With the exception of financial corporations, every corporation doing business within the limits of this State and not expressly exempted from taxation by the provisions of the Constitution of this State or by this act, shall annually pay to the State, for the privilege of exercising its corporate franchises within this State, a tax according to or measured by its net income, to be computed, in the manner hereinafter provided, at the rate of four per centum upon the basis of its net income for the next preceding fiscal or calendar year. In any event, each such corporation shall pay annually, to the State, for the said privilege, a minimum tax of twenty-five dollars.

Section 10: If the entire business of the bank or corporation is done within this State, the tax shall be according to or measured by its entire net income; and if the entire business of such bank or corporation is not done within this State, the tax shall be according to or measured by that portion thereof which is derived from business done within this State. The portion of net income derived from business done within this State, shall be determined by an allocation upon the basis of sales, purchases, expenses of manufacturer, pay roll, value and situs of tangible property, or by reference to these or other factors, or by such other method of allocation as is fairly calculated to assign to the State the portion of net income reasonably attributable to the business done within this State and to avoid subjecting the taxpayer to double taxation.

If the commissioner reallocated net income upon his examination of any return, he shall, upon the written request of the taxpayer, disclose to him the basis upon which his reallocation has been made.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1950

No. 152

EL DORADO OIL WORKS, a Corporation,
Appellant,

vs.

CHARLES J. McCOLGAN, as Franchise Tax Commissioner of the State of California,
Appellee.

APPELLANT'S BRIEF IN RESPECT TO A MOTION TO DISMISS OR AFFIRM.

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Table of Authorities Cited

Cases	Pages
Alpha Portland Cement Co. v. Massachusetts, 268 U.S. 203	20
Butler Bros. Co. v. McColgan, 315 U.S. 501, affirming 17 Cal. (2d) 654	1, 7, 10, 11
Capital Greyhound Lines v. Brice, 90 Sup. Ct. 806	16, 18
Hans Rees Sons v. North Carolina, 283 U.S. 123	5, 7, 20
Illinois Central v. Minnesota, 309 U.S. 157	15, 17
International Harvester Co. v. Evatt, 309 U.S. 411	16, 17, 18, 19
Matson Navigation Co. v. State Board, 3 Cal. (2d) 1, 297 U.S. 441	18
People ex rel. Alpha Portland Cement Co. v. Knapp, 129 N.E. 292	6, 7, 12, 20

Constitutions	
California Constitution, Article XIII, Section 16	11
United States Constitution, Fourteenth Amendment	4

Statutes	
California Bank & Corporations Franchise Tax Act (Stats. 1929, p. 19, amended, Stats. 1931, pp. 22, 26, Stats. 1935, p. 965):	
Section 4	13
Section 4(3)	2
Section 10	2, 3, 4, 7, 8, 9, 11, 13

In the Supreme Court
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No. 152

EL DORADO OIL WORKS, a Corporation,
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CHARLES J. McCOLGAN, as Franchise Tax Commissioner of the State of California,
Appellee.

APPELLANT'S BRIEF IN RESPECT TO A MOTION TO DISMISS OR AFFIRM.

Appellee's motion is based on the claim that no substantial Federal question is involved because the questions presented have been foreclosed by previous decisions of this Court. In support of this contention Appellee cites and primarily relies upon the decision of this Court in *Butler Bros. Co. v. McColgan,* 315 U. S. 501, affirming 17 Cal. (2d) 654. We shall analyze

this Court's decision in that case and shall refer to the decision of the California Supreme Court only as may be necessary in the interest of clarity.

The present appeal involves the construction and proper application of the allocation formula prescribed in Section 10 of the California Bank & Corporations Franchise Tax Act (Stats. 1929, p. 19, amended, Stats. 1931, pp. 22, 26, Stats. 1935, p. 965). Section 10 of the Act, as it read in the taxing years 1934 and 1935, and also Section 4(3), which provided for the imposition of the tax, are set out in Appendix A hereto attached. Section 4(3) provided that all corporations doing business in California should pay a tax equal to 4% of the net income resulting from business done within the State of California. Section 10 provided that, if the business of the corporation was carried on partly within and partly without the State of California, "the portion of net income from business done within the State shall be determined by an allocation upon the basis of sales, purchases, expenses of manufacturer, payroll, value and situs of tangible property, or by reference to these or other factors or by such other method of allocation as is fairly calculated to assign to the State the portion of net income reasonably attributable to business done within this state. * * *" The business done by Appellant in the tax years 1934-1935 came within this category and was a "unitary" business as that term is generally used and applied. Appellant within the time required by this statute and in the form provided by Appellee for that purpose, filed the requisite Franchise

Tax report and allocated its earnings for each of the taxable years by a formula based upon the five factors named in Section 10. The Appellee subsequently reallocated Appellant's income by a formula of his choice which excluded the factor of "manufacturing costs," entirely disregarded out-of-state purchases and classed as "within the state sales" 100% of Appellant's gross sales in disregard of Appellant's uncontroverted evidence that 61.4971% of such sales in the year 1934 and 77.7179% of such sales in the year 1935 were made outside of the State of California and were so reflected in Appellant's allocation for those years. Appellant's allocation schedule for the taxable year 1934 is shown in the record as Plaintiff's Exhibit 1 and for the taxable year 1935 as Plaintiff's Exhibit 2. Appellee's allocation schedules appear in the record as Exhibits 3, 4 and 5, respectively. Appellant admitted in the Trial Court and again in the Supreme Court of California that it was engaged during the taxable years in a unitary business, and therefore that an allocation of its income under the provisions of Section 10 of the Bank & Corporations Franchise Tax Act was necessary. It also conceded that the Statute as written was not unconstitutional. Appellant contended, however, that Appellee's allocation formula did not conform to the requirements of Section 10 in that it omitted the factor of "manufacturing costs" and entirely disregarded the item of out-of-state purchases which aggregated $963,280.11 in 1934 and $2,282,331.01 in 1935 and which constituted 89.9% of appellant's 1934 pur-

chases and 73.3% of its 1935 purchases. These should have been included under the statutory factor "purchases"; also that it arbitrarily classed as sales made within the state 100% of Appellant's gross sales in each of the years, in disregard of Appellant's uncontroverted evidence that 61.49% of Appellant's 1934 sales and 77.71% of Appellants' 1935 sales were made without the State of California. The essential question thus presented in the Trial Court and again in the Supreme Court of California, and now before this Court on this appeal, is as to the proper construction of the allocation formula set out in Section 10 of the Act and the legality of the Appellee's application of that Act in the allocation of Appellant's income and the assessment of the taxes here complained of. If the Statute had provided for the allocation to the State of California of all of Appellant's property without the state or all income earned entirely without the state, the Statute itself would be unconstitutional and in violation of the Fourteenth Amendment of the Constitution of the United States. This has been held by this Court in various cases which do not require specific mention here. If, on the other hand, whatever may be the provisions of this Statute, the agency charged with the administration of the Act has by its system of allocation assigned to the State of California and taxed income derived from business done without the state, and the Supreme Court of the taxing state has held that method to be warranted under the Statute, the Statute as so construed and the tax levied under the assumed author-

ity thereof results in a violation of the Fourteenth Amendment of the United States Constitution. That is the Federal question involved in this appeal; and the contentions of the Appellant are upheld by the decision of Chief Justice Hughes in the case of *Hans Rees Sons v. North Carolina*, 283 U.S. 123. That case turned on the construction and application of a formula for the allocation of income of a corporation conducting a unitary business in more than one state. This Court reviewed its previous decisions dealing with questions of the same or similar import, announced the general principle that where a corporation carrying on a unitary business, manufactures in one state and sells in another, the profits of the entire transaction as a unitary enterprise may not be attributed to either state (283 U.S. 132). It also held that as to such an enterprise all of the factors in that enterprise are essential to the realization of profits and that the entire net income may not be taxed in one state regardless of the extent to which it may be derived from the conduct of the business in another state. In the instant case it was definitely established by uncontroverted evidence that Appellant's profits were so obtained from the purchase of raw materials, the processing thereof and the sales of the resulting products.

Evidence to the same effect was before this Court in the *Hans Rees* case. This Court there held that the allocation to the State of North Carolina of the entire profits resulting from the manufacturing operations within that state regardless of the profits resulting

from the purchase of hides without the state, served to arbitrarily attribute to North Carolina a percentage of income out of proportion to the business transacted within that State. On that ground this Court held that the taxes so laid were beyond the state's authority, and repugnant to the Due Process provisions of the United States Constitution in that the tax so levied ignored the out-of-state purchases of hides.

The fallacy and inequality of Appellee's arbitrary exclusion of the factor "purchases" and his reclassification of 100% of Appellant's gross sales to the State of California, is well illustrated in the case of *People ex rel. Alpha Portland Cement Co. v. Knapp*, 129 N.E. 292. The New York statute there construed provided that the net income to be allocated to the state should be in the ratio that certain classes of assets in the state bore to the aggregate of all assets of that class wherever situated. The Court observed that the scheme of allocation as applied by the taxing authority took no heed of certain investments without the state. In holding such allocation to be arbitrary and unreasonable, Judge Cardozo said:

> "It measures the value of the franchise, here and elsewhere, by income from all sources and excludes some of the same sources when the value is apportioned. To take from assets elsewhere is equivalent to adding to assets here. * * * I am unable to avoid the conclusion that a method of apportionment which purposely ignores realities, which compels an assessor to look to some of the assets only and close his eyes to all others, is

arbitrary and unreasonable in its increase of the local burden."

The formula adopted by Appellee in assessing Appellant's franchise here accomplishes the identical result condemned by Judge Cardozo in that it ignored the reality of profits arising from Appellant's tremendous out-of-state purchases and sales. Although that case was decided by the Court of Appeals of the State of New York, certiorari was denied by this Court (256 U.S. 702).

The problem before this Court on the present appeal goes much deeper and is more vital than any question as to whether the allocation of Appellant's earnings for franchise tax purposes may be made by the use of a three-factor formula instead of the five factors named in Section 10 of the Act. Inasmuch, however, as Appellee has cited the decision of this Court in *Butler Bros. v. McColgan* as upholding the use of a three-factor formula, we will now consider that case in detail.

The questions considered by this Court in the above cited cases of *People ex rel. Alpha Portland Cement Company v. Knapp* and *Hans Rees Sons v. North Carolina* are the identical questions here involved and constitute the Federal question before the Court on this appeal. We believe that the decisions of this Court in the cited cases should be controlling.

The case of *Butler Bros. v. McColgan* did not uphold a three-factor formula as a substitute for the five-factor formula set out in Section 10 of the Act,

nor did it involve a question of allocation of the taxpayer's earnings for the purpose of fixing the amount of the Franchise Tax to be assessed under the Act. Butler Bros. was organized under the laws of the State of Ohio. It maintained its principal place of business and headquarters in the City of Chicago. It, however, operated branch plants in various states, including one in California, for the sale and distribution of its goods which were purchased through its central office in Chicago. Goods so purchased were billed at cost and shipped to the various state branches, of which California was one. Overhead and other operating expenses were apportioned to the various states in which branches were located more or less according to the business done, all profits and losses being entered in the principal office in Chicago. By its apportionment of costs and expenses the Company showed for Franchise Tax purposes that it realized a negligible or no profit from its operations in the State of California, whereas, the total profit from all of its branches was a considerable sum. In the circumstances the Company denied that it did a unitary business and refused to concede to the State of California a right to allocate its earnings according to the provisions of Section 10 of the California Bank & Corporations Franchise Tax Act. It contended that under the Statute no allocation whatever of its earnings was permissible and that its Franchise Tax liability, if any, should be computed on its separate California profit. The case was briefed and argued solely on the question whether the Com-

pany did a unitary business and the allocation provided for in Section 10 could be made by Franchise Tax Commissioner.

Inasmuch as the Company claimed and presented its case, in all the Courts, upon the sole ground that no allocation formula whatever was applicable, because the Company was not engaged in a unitary business, it could not and did not contend for any particular method of allocation. The Supreme Court of California concluded on the basis of the evidence before it that the Company was engaged in a unitary business and that the allocation formula set out in Section 10 of the Act could be properly applied; also that, inasmuch as the taxpayer made no claim that the three-factor formula as applied, was either arbitrary or unfair, under the facts of the case, there was no reason to condemn it or any necessity to decide whether or not it was in conformance with the provisions of the Act. This was merely an application of the well-settled principle that where a taxing authority has imposed a tax in assumed conformance with the authorizing Statute, objection to the amount of the tax will not lie in the absence of a showing of injustice or inequality. This is evidenced by the following observation of this Court at page 505 of the reported decision:

> "The propriety of the use of that formula is not questioned if by reason of the stipulated factors a formula for allocation to California of a portion of Appellant's income from all sources is proper."

It is very clear that the legality of a three-factor formula in the place of a five-factor formula provided by the Act was not in issue or involved. The opinion of the Supreme Court of California upholding or approving the Tax Commissioner's use of the three-factor formula under the facts of that case was qualified by the statement that "no showing has been made that income unconnected with the unitary business has been used in the formula." The most that can be said of the decision of the Supreme Court of California, or of the opinion of this Court affirming that decision is that the three-factor formula was not improperly used in the circumstances of that case in the absence of evidence showing that such method of allocation failed to reasonably attribute to California only the income from business done within that state. The evidence that was wanting in that case, according to the Court's opinion, is abundantly present in this case. The question or issue that was not raised in the case of *Butler Bros. v. McColgan*, namely, that the Commissioner by his allocation had unwarrantably increased the amount of earnings derived from business done within the State of California at the expense of earnings derived from business done without that state and, correspondingly, violated the Due Process provisions of the United States Constitution, was directly and continually advanced and maintained by Appellant throughout this case.

Section 10 of the California Bank and Corporation Franchise Tax Act required the use of the five factors therein named where, as in the present case, the factual information was available.

This statute was enacted by the California legislature pursuant to and in furtherance of the Constitutional amendment (1928 Art. XIII, Sec. 16), which provided for the manner of valuing franchises for taxation purposes. The Legislature alone was authorized to determine the method of valuation. The evident purpose of the Legislature was to fix the value of the franchise to be assessed by applying a formula consisting of five factors which, it was thought, would reasonably assign to the State of California, for taxation purposes, that portion of the corporation's net income which was attributable to business done within the state. All of the factors were of equal value in the formula and the use of all of those factors, rather than some only, was in the concept of the members of the Legislature the method established by the Legislature under the authority of the Constitutional amendment. The Legislature contemplated that the allocation should be made by the five factors set out in Section 10 or by some other method of allocation that is fairly calculated to assign to the State of California a portion of net income reasonably attributable to the business done within that state. The Legislature did not contemplate that some only of the five factors might be used and others omitted. That would have destroyed the balanced average. This

construction of the statute is borne out by the fact that in 1939 the Legislature amended Section 10, which was four years after the tax here involved was levied, to provide that the allocation might be made by the use of the five factors *or any of them* or other factors. If the allocation in the taxable years could have been made by the use of some of the named factors only, this 1939 amendment was wholly unnecessary. If, on the other hand, it was necessary, as the Legislature evidently thought, then the license to select some of the five factors and disregard others did not previously exist. We believe that Section 10, as originally enacted and as it read during the years in which the taxes herein questioned were imposed, represented the Legislature's matured judgment as to a formula that would embrace all of the factors entering into the profit of a unitary corporation and, by a division of each factor between within-the-state and without-the-state profits, would in the average fairly show what portion of the aggregate profits represented earnings from business done within the state. The elimination of any one of the factors would destroy the balanced average and in its finality either unduly increase or decrease the percentage of profit earned within the state or without the state. This was realistically condemned by Judge Cardozo in the case of *People ex rel. v. Alpha Portland Cement Co.*, supra.

It may be urged, not without reason, that the statutory construction above contended for is not necessary for the proper determination of the motion be-

fore this Court. If, however, as we contend, Section 10 should be read as requiring the use of the five-factor formula as the embodiment of the Legislature's matured opinion, the use by Appellee of three factors or any number less than the named five would constitute a fatal departure from the provisions of the statute imposing the tax. Compliance with such statutory provisions is always essential to the validity of the tax.

Whether the allocation provided for in Section 10 of the Act was to be made by the use of the five factors, as we have heretofore urged, or by some other method, it was necessary that the result should assign to California for taxation purposes, only that portion of the taxpayer's net earnings which was reasonably attributable to business done within the state. This was essential to the validity of the statute because the constitutional amendment hereinabove noted, only permitted the taxation of income arising from business done within the state, and the enabling section of the Act (Section 4) only provided for the taxation of intra-state income.

The claim is advanced in Appellee's brief that the Trial Court found and the Supreme Court affirmed that Appellee did not in his allocation include the percentage of income earned outside of the State of California. This claim is completely answered by the uncontroverted facts hereinabove noted, and also by the allocation schedules shown in the record as Exhibits 1, 2, 3, 4 and 5. The claim is also negatived by

the assertion in Appellee's brief that Appellee's disregard of out-of-state purchases was overcome through Appellee's use of the factors of payroll and property. This assertion is without support in the record. Appellant's schedule of allocations (Exhibits 1 and 2) which meticulously set out Appellant's total purchases for each of the years with the breakdown showing that Appellant's out-of-state purchases in the year 1934 totaled $963,290, which was 89.99% of Appellant's total purchases for that year. The 1935 schedule (Exhibit 2) likewise listed Appellant's 1935 purchases in the amount of $2,282,331 or 73.36% of the total purchases as having been made without the State of California. In his allocation Appellee made no change in the amount of Appellant's purchases. He simply ignored the out-of-state purchases, and thus, in effect, allocated all of Appellant's purchases to the State of California. The figures set out in Appellant's said allocations were attested as correct by Appellant's accountant, also by Appellant's Vice President, and were confirmed as correct by a Certified Public Accountant, who testified that he had personally examined Appellant's books and records and determined that Appellant's figures and the allocations reported were correct. There was no evidence in the Trial Court in opposition to this showing. Appellee accepted Appellant's figures as to gross sales and gross purchases. Those figures so accepted could not have a different significance when used by Appellee in his allocations and, therefore, the claim that Ap-

pellee in using those figures cured the omission of the out-of-state purchases figures is without merit. This is apparent in the fact that Appellant's out-of-state purchases in the year 1934, which amounted to $963,280, and its out-of-state purchases in the year 1935, which totaled $2,282,331, could not by any method of calculation have been included in the item of wages which only totaled $206,763 in the year 1934 and $266,412 in the year 1935. Nor for the same reason could they have been included in property values. These totals were not changed by Appellee to include the much larger figure of out-of-state purchases in either of the two years. If, as was established by Appellant's incontroverted evidence, Appellant's schedules correctly stated the amount of property within and without the state and the amount of wages paid within and without the state, as well as the purchases within and without the state, those figures could not be distorted as was done by Appellee to include out-of-state purchases in the category of either wages or property, which factors in the aggregate were very much less than the amount of out-of-state purchases. It is incontrovertible that Appellee in his allocations simply disregarded in their entirety the items of out-of-state purchases in both of the taxable years, although those items represented Appellant's largest single expense.

In further support of his motion to dismiss Appellee has referred to: *International Harvester Co. v. Evatt*, 309 U.S. 411, *Illinois Central v. Minnesota*,

309 U.S. 157 and *Capital Greyhound Lines v. Brice*, 90 Sup. Ct. 806.

These cases will be considered as a group because in effect they are all cited to the point that this Court has long recognized the practical impossibility of a state's achieving for taxation purposes a perfect apportionment of complex business activities and that "rough approximation" rather than precision is sufficient. Whatever may be said of its generality, this doctrine has no bearing on Appellee's motion to dismiss or on the merits of the present case. In the International Harvester case the taxpayer claimed that under the statute there considered the state had laid an unlawful tax upon interstate commerce. This Court stated, and the record supports its statement, that the tax there under attack was not imposed on interstate commerce, but that the amount of interstate commerce as well as other items were used as a means to admeasure for tax purposes the value of certain properties held by the taxpayer. The taxing statute and the method of applying it were entirely different from those provided in the California statute. If, as might be inferred from the excerpt from that opinion quoted in Appellee's brief, it is difficult or impossible for a state to devise an exact or appropriate method for the fixing of values for taxation purposes, and that "rough approximation" rather than precision is all that may be required, that situation was not existent in the present case. The California Bank & Corporations Franchise Tax Act,

under which the tax complained of was assessed, is definite and perfectly clear in its provisions and requirements. The method of allocation is simple and applicable as is shown by Appellant's allocations (Exhibits 1 and 2) and likewise shown in Appellee's schedules (Exhibits 3, 4 and 5) except for the fact that Appellee did not follow the statutory provisions. The unscientific doctrine announced in the *International Harvester* case was first expressed in *Illinois Central v. Minnesota,* also cited by Appellee. The tax complained of in that case was a property tax, not a privilege tax, as to which the rules are very different. It has been long established that in respect to property taxes the assessing authority is permitted a wide discretion, and his action is protected by the presumption that official duty has been performed. There is no inherent difficulty in the way of a state's providing for the levying of a property tax. There is nothing in the record of the *Illinois Central* case to warrant the Court's observation that "rough approximation rather than precision" is sufficient in the valuing of property for taxation purposes. Furthermore, the doctrine advanced in the *International Harvester* case is qualified by its context wherein the Court says:

> "Unless a palpably disproportionate result comes from an apportionment, a result which makes it patent that the tax is levied upon interstate commerce rather than upon an intrastate privilege, this Court has not been willing to nullify honest state efforts to make apportionments."

The case of *Capital Greyhound Lines v. Brice* is likewise not in point either on the motion to dismiss or on the merits of the present case. That case presented an attack on the validity of a Maryland statute which imposed a tax on motor vehicles according to their cost and value for the privilege of using the Maryland highways. This Court held that the formula was not inherently unfair to the interstate carriers who attacked the statute and that those carriers did not show that there was any discrimination against interstate carriers in the administration of the law. The basis of Appellee's motion to dismiss is that, as he claims, no substantial Federal question is presented. That question was not involved or considered in the *International Harvester* case, the *Illinois Central* case or the *Capital Greyhound* case. If, as contended by the taxpayers in those cases, the statutes imposed an unlawful tax on interstate commerce, which this Court in its opinions denied, that question has no place on this appeal. Appellant has not contended, either in the Lower Courts or here, that the California Bank & Corporations Franchise Tax Act provides for an unlawful tax on interstate commerce. It merely provides for a tax on the franchise privilege of doing intrastate business in the State of California. This Court affirming the decision of the California Supreme Court long ago held that the California statute did not impose or seek to impose a tax on interstate commerce.

(*Matson Navigation Co. v. State Board*, 3 Cal. (2d) 1, 297 U.S. 441.)

The remainder of Appellee's brief in support of his motion is given over to a discussion of sales, particularly for the purpose of determining whether or not the tax imposed thereon is a tax on interstate commerce. He asserts that an attack by Appellant in this case is foreclosed by the decision of this Court in the *International Harvester* case and other cases cited. The obvious fallacy in Appellee's argument is that Appellant has not claimed either here or in the Lower Court that the tax provided in the statute constituted an unlawful burden upon interstate commerce. Appellant's claim was and is that the allocation formula provided in Section 10 of the Act requiring that Appellant's sales and purchases should be classified so as to distinguish between those within the state and without the state. Those consummated within the state would enter into the valuation of the franchise for tax purposes, whereas, those without the state would not. Appellant is not at present concerned either in connection with the motion to dismiss or a discussion of the merits of the case with the taxing statutes of other states. We have in the California Bank & Corporations Franchise Tax Act a definite and complete taxing scheme. Whether or not the taxing scheme provided in the statute of other states is in itself lawful, or whether in its application it imposes an unlawful tax upon interstate commerce or violates any provisions of the United States Constitution, or whether in a particular case under such other statute, sales are actually or constructively made in a taxing

state or otherwise, has absolutely no bearing upon the merits of Appellee's motion to dismiss, on the ground that no substantial Federal question is presented on this appeal. The loci of Appellant's sales is a question of fact and the undisputed evidence showed that the sales claimed by Appellant to have been made without the State of California were so made. Appellee's attempted classification of such sales as made within the state was arbitrary and without any support in the evidence. No matter what may be decided or opined as to where sales considered in the cases cited by Appellee were made and whether or not they were intrastate under the statutes of other states reviewed in the cases cited by Appellee cannot by any method of reasoning, or any stretch of the imagination, have any bearing upon the merits of Appellee's motion to dismiss. Appellant will, therefore, not unduly extend this brief or impose upon this Court a critical study of the cases cited at page 7 of Appellee's brief.

In the foregoing pages we have urged that this appeal presents a substantial Federal question, that is to say, the invalidity of the Franchise Tax assessed against Appellant for the years 1934-1935 as upheld by the Supreme State of California. The taxes are essentially the same as those condemned in the decisions of this Court: *People ex rel. Alpha Portland Cement Co. v. Knapp*, 256 U.S. 702, *Hans Rees' Sons v. North Carolina*, 283 U.S. 123 and *Alpha Portland Cement Co. v. Massachusetts*, 268 U.S. 203. A sub-

stantial Federal question was and is thus presented which calls for the decision of this Court.

We respectfully submit that Appellee's motion to dismiss or affirm should be denied.

Dated, San Francisco, California,
July 17, 1950.

W. F. WILLIAMSON,
PERCY J. CREEDE,
Attorneys for Appellant.

W. S. CULBERTSON,
Of Counsel.

(Appendix A Follows.)

Appendix A

California Bank and Corporation Franchise Tax Act (Stats. 1929, p. 19, amended, Stats. 1931, p. 2226, Stats. 1935, p. 965):

Section 4(3): With the exception of financial corporations, every corporation doing business within the limits of this State and not expressly exempted from taxation by the provisions of the Constitution of this State or by this act, shall annually pay to the State, for the privilege of exercising its corporate franchises within this State, a tax according to or measured by its net income, to be computed, in the manner hereinafter provided, at the rate of four per centum upon the basis of its net income for the next preceding fiscal or calendar year. In any event, each such corporation shall pay annually, to the State, for the said privilege, a minimum tax of twenty-five dollars. * * *

Section 10: If the entire business of the bank or corporation is done within this State, the tax shall be according to or measured by its entire net income; and if the entire business of such bank or corporation is not done within this State, the tax shall be according to or measured by that portion thereof which is derived from business done within this State. The portion of net income derived from business done within this State, shall be determined by an allocation upon the basis of sales, purchases, expenses of manufacturer, pay roll, value and situs of tangible

property, or by reference to these or other factors, or by such other method of allocation as is fairly calculated to assign to the State the portion of net income reasonably attributable to the business done within this State and to avoid subjecting the taxpayer to double taxation.

If the commissioner reallocates net income upon his examination of any return, he shall, upon the written request of the taxpayer, disclose to him the basis upon which his reallocation has been made.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1950

No. 152

EL DORADO OIL WORKS (a corporation),
Appellant,

vs.

CHARLES J. McCOLGAN, as Franchise Tax Commissioner of the State of California,
Appellee.

APPELLANT'S PETITION FOR A REHEARING FROM ORDER GRANTING MOTION TO DISMISS.

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Cases **Pages**

Butler Bros. Company v. McColgan, 315 U. S. 501.....2, 4, 5

Hans Rees Company v. North Carolina, 283 U. S. 123..... 4, 5

International Harvester Co. v. Evatt, 329 U. S. 416.....2, 4, 5

People ex rel. Alpha-Portland Cement Company v. Knapp, 129 N. E. 202 4

Statutes

California Bank and Corporation Franchise Tax Act, Section 10 .....2, 3, 5

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APPELLANT'S PETITION FOR A REHEARING FROM ORDER GRANTING MOTION TO DISMISS.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

This Honorable Court on October 9, 1950, granted Appellee's Motion to Dismiss the Appeal in the above

captioned case and in support of its Order cited but two cases:

Butler Bros. Company v. McColgan, 315 U.S. 501,

and

International Harvester Co. v. Evatt, 329 U.S. 416.

Appellant is filing the present Petition in the conviction that the cited cases do not either factually or legally support the Order of Dismissal. For this reason and because the record has not as yet been printed, we shall deal primarily with the two cited cases.

The case of *Butler Bros. Company v. McColgan* was instituted and briefed throughout on the claim that the Company was not carrying on a unitary business and, therefore, its income was not subject to allocation under the provisions of Section 10 of the California Bank and Corporation Franchise Tax Act. Upon this ground the taxpayer contended that no allocation formula could be legally applied. The Franchise Tax Commissioner charged with the administration of the Act applied a three-factor formula in the allocation of the taxpayer's income and fixed the tax accordingly.

This Court in affirming the decision of the California Supreme Court sustained this action of the Franchise Tax Commissioner, not upon the ground that that was the only proper formula to be applied, but on the ground that Butler Bros. Company having stipulated the facts agreed that, if the application of a formula for allocation was proper, the one so applied

worked no injustice to the taxpayer. This affirmatively appears from the following statement in the opinion of this Court:

> "No other factor or method of allocation was considered. The propriety of the use of that formula is not questioned if by reason of the stipulated facts a formula for allocation to California of a portion of Appellant's income from all sources is proper."

In its opinion in the cited case this Court also stated:

> "One who attacks a formula of apportionment carries a distinct burden of showing by 'clear and cogent evidence' that it results in extraterritorial values being taxed. No such showing has been made here."

Such a showing was quite impossible in the cited case. In the present case Appellant has conceded that its business is of a unitary character, and, therefore, that an allocation of income was proper under Section 10 of the Act. It contends, however, that the formula used by the Franchise Tax Commissioner was not the proper formula not only because it did not conform to the provisions of the Act, that the income should be allocated so that only income reasonably attributable to business done within the State of California should be made subject to the tax, but also because the taxing authority actually omitted the matter of foreign purchases, from which Appellant realized large profits, and also arbitrarily assigned to Cali-

fornia a large volume of profitable out-of-state sales. In effect, he allocated to California 100% of Appellant's purchases and 100% of its sales in complete disregard of the uncontroverted evidence and, in fact, the admissions in the record that those purchases and sales were made without the State of California. No such question was briefed or considered in the cited case of *Butler Bros. Company v. McColgan.* Such omissions and exclusions on substantially identical facts were held by this Court in *Hans Rees Company v. North Carolina,* 283 U.S. 123 and in *People ex rel. Alpha-Portland Cement Company v. Knapp,* 129 N.E. 202 (certiorari denied by this Court) to constitute a violation of the Due Process provisions of the United States Constitution. To avoid repetition we respectfully refer the Court to Pages 3, 4, 14 and 15 of Appellant's brief in respect to the motion to dismiss or affirm.

The case of *International Harvester Company v. Evatt,* also cited by the Court, is wholly out of line with the facts of the present case, and does not, we respectfully submit, warrant the order of dismissal. In its decision of the *International Harvester Company* case, this Court used the following language:

> "Unless a palpably disproportionate result comes from an apportionment, a result which makes it patent that the tax is levied upon interstate commerce rather than upon an intrastate privilege, this Court has not been willing to nullify honest state efforts to make apportionments.

The present case does not, as did the *International Harvester Company* case, present a charge that the state had levied a tax upon interstate commerce, and what this Court said in that relation is without effect in this case. We again refer the Court to Pages 3, 4, 5, 14 and 15 of Appellant's brief in opposition to the motion to dismiss or affirm.

Under facts identical with those considered by this Court in its decision in the *Hans Rees* case Appellant here claims that the taxing authority overlooked the uncontroverted fact that substantial earnings were derived by Appellant from foreign purchases and out-of-state sales, which solely accounted for the tax complained of. It is Appellant's contention that this violated the Due Process provisions of the United States Constitution. The decision of this Court in *Butler Bros. Company v. McColgan* and *International Harvester Company v. Evatt* (supra), cast no shadow upon the merits of Appellant's claim.

In its effort to comply with the spirit of the rules Appellant has made this Petition very brief. We trust, however, that the Court will not mistake this brevity as indicating a lack of faith in the merits of Appellant's Petition for Rehearing. We believe that Appellant is entitled to a full hearing of this case on its merits and that such a decision will serve the desired purpose of clearing up the serious uncertainty which now exists as to the construction of the allocation provisions of Section 10 of the California Bank and Corporation Franchise Tax Act.

Appellant respectfully prays that this Honorable Court grant this Petition and accord to Appellant the opportunity to present its case upon the merits.

Dated, San Francisco, California,
October 18, 1950.

Respectfully submitted,
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Attorneys for Appellant and Petitioner.

W. S. CULBERTSON,
Of Counsel.

CERTIFICATE OF COUNSEL REGARDING
PETITION FOR REHEARING.

This is to certify that the foregoing Petition for Rehearing is presented in good faith and not for the purpose of any delay.

Dated, San Francisco, California,
October 18, 1950.

W. F. WILLIAMSON,
Counsel for Appellant.

No. 152. El Dorado Oil Works *v.* McColgan, Franchise Tax Commissioner. Appeal from the Su-

preme Court of California. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed. *Butler Bros.* v. *McColgan*, 315 U. S. 501; *International Harvester Co.* v. *Evatt*, 329 U. S. 416. *W. S. Culbertson* and *W. F. Williamson* for appellant. *Fred N. Howser*, Attorney General of California, and *James E. Sabine*, Deputy Attorney General, for appellee. Reported below: 34 Cal. 2d 731, 215 P. 2d 4.